Further down the page His Lordship added:

"But there were other good grounds, and formidable grounds (as I think) for refusing the plaintiff an injunction. That he misled the defendants is beyond a peradventure. It is no less clear that he attempted to mislead the court. He asserted – contrary to the fact – that he had never had any conversation with the defendants about the matter at all; and in his evidence-in-chief he so swore, untruly. It is not, therefore, at all surprising that the learned judge came to the conclusion that he should grant no equitable relief; and, in my judgment, on the facts of this case he was well entitled to take that view".

Whereas in the instant case the damage was not trivial in nature and could not be remedied by compensation in damages. The encroachment particularly the septic tank adversely interfered with the use by the respondent of his land for the purpose of building a dwelling house. As such the discretion to grant the injunctions by the learned Judge had been properly exercised.

Is there something special in the circumstances of the present appeal to deprive the respondent from the remedy of perpetual injunction to prevent the continued violation of his legal and proprietary rights? We think there is none except for the alleged delay in initiating proceedings against the appellants. In this respect, we agree with Miss Ambiavagar that the respondent must have known or ought to have known about the encroachment in 1970 when he planned erecting his own house on lot 179. We cannot accept any suggestion that the respondent was not aware of the encroachment until early 1971 when he raised it with Malayan Finance by letter dated March 25, 1971 (Exhibit P2). The letter reads as follows:

"The Manager,
Malayan Finance Co.,
16-18 Medan Pasar,
Kuala Lumpur

Dear Sir,

House No. 75A Lorong Penghulu Mat
Encroachment on lot 179
Owner E.W. Talalla

I am constructing a house just behind the above premises and observe that the rear portion has encroached on my lot to the extent of about ten feet along the entire length.

Kindly arrange to resite your septic tank and extension early as I wish to erect a garage and fence.

I shall be pleased if we could come to an amicable settlement and let me know your intention early.

Yours faithfully,

Sgd. E.W. TALALLA."

In our view the letter was worded in such polite tone that it could not be said to have come from a landowner who was completely taken by surprise of the encroachment. It is true the writ was filed in October 1977, about 2½ years after the letter dated May 28, 1975 was written by respondent's solicitors requesting the appellants to remove the encroachment. But the fact remains, the respondent never gave his assent either expressly or impliedly to the continued existence of the septic tank and the fence on his land ever since he became aware of it in 1970. The appellants became registered proprietors of the property only on February 6, 1975 and in less than four months they were already notified by letter to have the encroachment removed. In the circumstances, the respondent cannot possibly be held to be guilty of laches so as to disentitle him from the remedy of injunction that he had sought.

For the above reasons we would dismiss this appeal with costs. The deposit should be paid to the respondent to account of the taxed costs.

Appeal dismissed.

Solicitors : *Ambiavagar & Co.; T. Ariarajah.*

NAM BEE RUBBER ESTATE SDN. BHD. v. SYARIKAT TANAMAN PERAK BHD.

[S.C. (Hashim Yeop A. Sani, Syed Agil Barakbah & Wan Hamzah S.C. JJ.) February 28 & June 29, 1985]

[Kuala Lumpur – Federal Court Civil Appeal No. 246 of 1984]

Contract – Contract to clear land for the purpose of developing it as oil palm estate – Date of commencement and date of expiry.

In this case the appellant had undertaken to construct a road and drainage system on the land belonging to the respondent and to clear the land of its timber for the purpose of developing it as an oil palm estate. The agreement was terminated by the respondent. The appellant claimed that the termination of the agreement was unjustifiable and was in breach of the express or implied terms of the contract. The main question at issue was the actual time when the contract started to run. It was argued for the respondent that the period started from the date of the agreement that is August 5, 1974. On behalf of the appellant it was argued that the agreement started on August 1, 1977 when the timber licence was issued. The learned trial judge dismissed the claim of the appellant who then appealed.

Held, dismissing the appeal: even though the work of extracting timber which was part of the appellant's contractual obligations commenced on the approval of the timber licence, the whole agreement became effective and commenced on August 5, 1974 or thereabout when the work of constructing roads and draining was started.

Cases referred to:

(1) *Roberts* v. *Brett* (1865) 11 H.L.C. 337; 11 E.R. 1363.
(2) *Hudson* v. *Hill* (1874) 43 L.J.C.P. 277.

SUPREME COURT.

Wong Choon Wah for the appellant.
Gurubachan Singh (*Kartar Singh* with him) for the respondent.

Cur. Adv. Vult.

Syed Agil Barakbah S.C.J.: The respondent Syarikat Tanaman Perak Berhad ("Syarikat"), the owner of a piece of land Block 19, Lot 6871 situated in the Mukim of Hutan Melintang in the State of Perak was also the holder of a timber concession in respect of the said block. They intended to have the land cleared of its timber for the purpose of developing it as an oil palm estate. The appellant ("Nam Bee") owned the adjoining land Block 20 and had been extracting timber from it. As a result of a discussion between the parties on May 10, 1974, Nam Bee wrote to Syarikat offering to undertake the construction of a proposed road and drainage system in Syarikat's land (Block 19). The latter replied accepting the offer and also offered Nam Bee to extract timber on its land *vide* letter dated July 15, 1974. Nam Bee did not accept the condition at para 2(e) of the said letter which required the whole area to be cleared within a period of twenty-four months from the date the survey plan from the Juru Ukur Berlesen was given to Nam Bee. As the period was too short, Nam Bee suggested sixty months *vide* letter dated August 1, 1974. The counter-proposal was accepted by Syarikat. Nam Bee followed up with another letter dated August 5, 1974, referring to Syarikat's letter dated July 15, 1974. I wish to highlight the paragraphs which are relevent for the purpose of this appeal. Nam Bee says:

"(2) Extraction of Timber from Lot No. 19 Mukim of Hutan Melintang, District of Lower Perak

(a) ...

(b) ...

(c) We shall pay you for the timber extracted at the rate of $32/- per acre. In this connection, we understand that your land is currently under survey by Mr. Sow Tung Low, Juru Ukur Berlesen and the total amount payable by us shall be calculated according to the total area shown on the Survey Plan of the Juru Ukur Berlesen at the rate of $32/- per acre.

(d) ...

(e) *We will commence to extract timber as soon as possible after construction of drains (with roads beside them) starting first with the section nearest to Lot No. 20 and continuing further northwards until the whole area is cleared within a period not exceeding sixty months from the date the survey plan from the Juru Ukur Berlesen is given to us.* In this connection, timber in the first section nearest to Lot No. 20 comprising an area of approximately 1300 acres must be completely extracted within a period of thirty-six months from the date the Survey Plan is given to us. (Reference our letter of August 1, 1974 regarding amendments to the time required for extraction of timber).

(f) At our request, you shall do all things and sign all application forms and other documents which may be required by the Government from time to time so as to enable us to extract timber from your land in accordance with the provisions herein.

(g) ...

If the above terms and conditions are acceptable to you, kindly confirm by signing and returning to us the duplicate copy of this letter.

Yours faithfully,

NAM BEE RUBBER ESTATE SDN. BERHAD

Signed

TAN ANN LOONG"

According to Tan Ann Loong of Nam Bee, he delivered the said letter by hand to Wong Aun Phui of Syarikat and a few days later received a telephone call from him to come and collect the confirmation letter. On doing so, Tan noticed some additional typewritten words following the confirmation clause at the bottom. It says as follows:

"We confirm that the above terms and conditions relating to construction of drains and extraction of timber are acceptable to us and are effective forthwith. It is understood that the amount of increase in fee for construction of drains (with roads beside them) basing on cost of material and labour is subject to mutual consent. Photostat copy of Survey Plan by Syarikat Sow Tung Low, Juru Ukur Berlesen is also attached hereto and this agreement is, therefore, effective forthwith.

Signed
for and on behalf of
TANAMAN PERAK BHD."

Subsequently, he received another letter from Syarikat dated August 22, 1974, confirming that their agreement took effect on August 5, 1974 (Ex. P1). The letter states:

"Mr. Tan Ann Loong,
Managing Director,
Nam Bee Rubber Estate Sdn. Bhd.,
429 & 431, Jalan Tuanku Abdul Rahman,
P.O. Box 311,
Kuala Lumpur.

Dear Sir,

Re: Proposed Drainage System for Lot 19, Hutan Melintang District of Lower Perak

With reference to your letter August 1, 1974, I confirm the following:-

(a) Since the Survey Plan drawn by Syarikat Sow Tung Low, Juru Ukur Berlesen showing an area of 3662. 7706 acres for the above Lot has since been attached to your letter dated August 5, 1974, duly signed by you on behalf of Nam Bee Rubber Estate Sdn. Bhd. and myself on behalf of Syarikat Tanaman Perak Berhad, the agreement between us took effect from that date *i.e.* August 5, 1974.

Yours faithfully,

Signed

GOH TJOEI KOK."

According to Tan, he sent a reply on August 29, 1974 (Ex. P.2), but Syarikat denied having received it. From the contents of the letter, Nam Bee was not happy with the photostat copy of the survey plan attached without having been approved by the Survey Department, Taiping. However, they would agree that the effective date for their agreement to commence was August 5, 1974 if the survey plan was acceptable by the relevant authority and the timber permit was given to them within a reasonable time, *i.e.*, within two or three months from the date. If there was any further delay, then the agreement would take effect on the date the timber permit was issued to them and not on August 5, 1974. These appeared to be new conditions which were not set out in the previous correspondence.

There was no reply to the said letter by Syarikat. Unlike the letter of August 5, the letter of August 29 did not require any confirmation by Syarikat. Nor did Nam Bee follow up by any reminder in order to obtain the agreement of Syarikat to their counter-proposal regarding the change in the date of commencement of their agreement. On the contrary, Nam Bee proceeded with the contract to construct the roads and drains in accordance with the agreement.

There was correspondence between them relating to progress reports and the expenses incurred from time to time. Nothing was mentioned about Nam Bee's last letter. It was not until two and a half years later on March 8, 1977, that Nam Bee wrote to Syarikat on the matter (Ex. P.7). The reason for Ex. P.7 was because of the delay in the issue for licence to extract timber and in order to avoid any further delay authority should be given to Nam Bee to communicate direct with the Land Office. Syarikat complied with this request. Subsequently, the timber licence was issued on August 1, 1977. Thereafter Nam Bee carried out extracting timber on the said land. Since the licence was for a six-month period, they successfully applied for renewal in Syarikat's name and continued with their logging work until July 29, 1980 when they received notice from Syarikat's solicitors requesting them to stop logging because the agreement had expired. Nam Bee also received a letter from the Forest Department dated August 12, 1980 giving them two weeks' notice to stop logging operations unless they succeeded in showing good cause that the timber licence should not be cancelled. The licence was finally cancelled on December 4, 1980. It was clear from the facts and circumstances stated above that the new conditions were never accepted by Syarikat and were not insisted upon by Nam Bee.

Nam Bee's case was that Syarikat's action in terminating the agreement was unjustifiable and was in breach of the express or the implied terms of the agreement. The main question that arose before us and the Court below was the actual time when the five-year period started to run. It was submitted by the learned counsel for Syarikat that the agreement commenced on August 5, 1974, as confirmed by the letter of the same date and also by the letter dated August 22, 1974 on the ground that the photostat copy of the survey plan prepared by the licensed surveyor was attached to the letter dated August 5, 1974, which was duly signed by both parties. The learned counsel for Nam Bee on the other hand submitted that the agreement started on August 1, 1977, when the timber licence was issued. They based their ground on their letter dated August 29, 1974, which was subsequently followed by letter dated March 8, 1977. For the reasons stated earlier, I agree with the trial Judge that the letter dated August 29, 1974, should be disregarded. I am of the view that the main requirement of paragraph 2(e) of the letter dated August 5, 1974, in order to determine the real intention of

the parties. The matter also depends on the relevant facts and circumstances of the case. Since this was not a formal sealed agreement normally executed between the parties, the relevant letters as stated earlier culminating in the letter dated August 5, 1974 had to be taken into account.

In construing paragraph 2(e) it has to be borne in mind that Nam Bee has agreed to perform two different kinds of work, *viz.*, the construction of roads and drains and the extraction of timber in the same area. In their letter of August 1, 1974, to Syarikat (see pages 189/190 of Appeal Record) Nam Bee made counter-proposals giving details of the works and the estimate of the time required for each section covering the period of sixty months. They divided the whole area into three sections. Apparently Nam Bee had to start with the construction of roads and drains first before they could commence to extract timber in the first section of Lot 19 which is nearest to Lot 20 comprising of 1,300 acres. The time estimated for the completion of both works in the said section was 36 months from the date the survey plan from the licensed surveyor was handed to Nam Bee. Since both cannot be done at the same time the construction work had to be done first. On its completion Nam Bee would commence to extract timber. It is stated in the letter August 1, that the excavation of drains and roads for the whole area would take about 18 months to complete. The roads required a minimum of another 18 months to dry up and harden before they could be used by heavy vehicles to transport timber. It would therefore require 36 months to lapse before the extracting of timber could be done to the other sections. However the extraction of timber in the first section was excepted since that could be done immediately after the construction work, *i.e.*, after 18 months and it would be completed between 12 to 18 months thereafter (see pages 189/190 of Appeal Record). Taking the above into consideration it is clear that the contract was for two different kinds of work each essential for the performance of the other but the completion of one, *i.e.*, construction of the roads and drains was necessary for the commencement of the other, *i.e.*, extraction of timber with the exception of the first section as stated earlier. It is also apparent that the sixty-month period covered both construction work and extraction of timber. Construction work did not require any timber licence or permit which would be only necessary for the purpose of extracting timber in the first section about one and half years later, *i.e.*, on the completion of the construction work. It is also necessary for construction work to start earlier on the handing over of the photostat copy of the survey plan to Nam Bee, *i.e.*, on August 5, 1974, as confirmed by Syarikat. Both parties knew or ought to have known that the original plan had been submitted by the licensed surveyor to the authorities. As stated earlier Nam Bee in fact started with the construction of roads and drains while waiting for the approval of the timber licence which however was long delayed. On the approval of the licence they started extracting timber, successfully applied for renewal of the licence and obtained a one-year extension of the contract period from Syarikat to continue extracting work after the lapse of the sixty-month period. It was only after the lapse of the extension period that the Syarikat terminated the contract. On these grounds alone it would be unreasonable to accept the argument that the agreement commenced on the day the timber licence was issued.

There are other reasons as given by the learned Judge. In the first place Nam Bee did not make it clear what they meant by "approved" survey plan. According to the Deputy Director of Survey Perak (P.W.2) a survey record which consisted of a survey plan, two fields books and two calculation volumes were submitted for his checking and approval. That was subsequently returned to the licensed surveyor for certain adjustment and finally approved on January 16, 1982. If there was anything to be approved at all, it was the survey record and not just the survey plan and its approval was well past the date when the timber licence was approved. In fact the survey plan attached to the timber licence issued on August 1, 1977, still bore an endorsement by the Collector of Land Revenue that it was subject to amendments by the Director of Survey, Perak (see pages 218-228 of Appeal Record). The survey record in our view has nothing to do with the issue of a timber licence.

Secondly, the learned Judge was satisfied that Syarikat had done all they could in their endeavour to obtain a timber licence and no blame could be attached to them for the delay. They had complied with the condition stated at paragraph (f) of the letter dated August 5, 1974. Earlier when Nam Bee wrote to Syarikat to apply for a timber licence from the Forest Department, Syarikat complied. After about two and a half months the Forest Department wrote to Land Office, Teluk Intan to ensure that the land in question was alienated to Syarikat. That was confirmed after a few months. Correspondence were exchanged between the Land Office, the Forest Department and the Survey Department, Perak which advised Forestry to refer

the matter to the Land Office. More than a year later Forestry received a reply from the Land Office giving the correct area of the said land as 3662.7706 acres. A plan prepared by Syarikat Sow Tung Low, licensed surveyor duly certified by the Land Office and bearing endorsement as stated earlier was attached. It was on that basis that Forestry issued a timber licence.

On the other hand the correct area was already known to the parties when the photostat copy of the same plan was attached to Nam Bee's letter dated August 5, 1974, and acknowledged by Syarikat in their letter dated August 15, 1974, (Ex. P.1) confirming further that the agreement commenced on August 5, 1974. As stated at paragraph (b) of the latter the same surveyor's plan would apply for official purpose. As stated at paragraph (c) of the former the total area stated in the said plan would form the basis of calculation which Nam Bee would pay Syarikat for the total amount of timber extracted at the agreed rate of $32/- per acre. It might be argued that in the circumstances the more reasonable inference would be a survey plan "duly certified by the Land Office". However that was not Nam Bee's case. As an experienced logging contractor they would have clearly stated the terms to that effect if they had that in mind. They appeared to be unsure of their stand. In their amended statement of claim they prayed for a declaration that the sixty-month period would either commence from the date a proper survey plan acceptable to the Forest Department was given by Syarikat to them or from the date the timber licence was issued on August 1, 1977, or alternatively within a reasonable time as prescribed by the Court. As explained earlier they had to commence with the construction of road and drains first before the extraction of timber. They would have been able to start with the latter well within time had there been no delay in the issue of a timber licence. On the other in spite of the thirty-five month delay, Nam Bee carried out with their contractual obligations after the approval of the licence. Taking that into account with the extension of time allowed by Syarikat until the time the licence was finally cancelled, the actual period covered by Nam Bee excluding the period of delay, was about sixty months.

For the reasons stated above I am of the opinion that even though the work of extracting timber which was part of Nam Bee's contractual obligations, commenced on the approval of the timber licence, the whole agreement became effective and commenced on August 5, 1974, or thereabout when the work of constructing roads and drains was started.

I do not consider the other grounds can serve any purpose to necessitate my comments. I therefore confirm the judgment of the Court below and dismiss the appeal with costs.

Deposit to respondent to account for taxed costs.

Hashim Yeop A. Sani S.C.J.: I agree that the appeal should be dismissed with costs.

The land had been alienated for the purpose of planting oil palm. The first part of the letter dated August 5, 1974 dealt with the work of excavating the drains and clearing the land. The second part of the letter dealt with the extraction of timber from the land and that part of the letter dealt with the terms and conditions which seem to have been agreed to by the parties. At the bottom of the last page of the letter there appears a footnote which was admittedly inserted by the appellant which note states as follows:

> "We are confirming that the above terms and conditions relating to construction of drains and extraction of timber are acceptable to us and are effective forthwith." – page 194.

What followed immediately after this footnote is an additional footnote which was also admittedly inserted by the respondents. The additional footnote reads as follows:

> "It is understood that the amount of increase in fee for construction of drains (with roads beside them) basing on cost of material and labour is subject to mutual consent. Photostat copy of survey plan by Syarikat Sow Tung Low, Juru Ukur Berlesen is also attached hereto and *this agreement is therefore effective forthwith.*" (Emphasis provided.)

The additional footnote reproduced above and inserted by the respondent did not affect the commencement of the agreement in substance as it deals specifically with the increase in fees for construction of drains. As regards the commencement of the agreement itself, the words "effective forthwith" also appear in the additional footnote.

It would seem to be the contention of the appellant all along that the sixty-month period referred to in clause (e) of the payment, that is, the letter dated August 5, 1974, should run from August 1, 1977, that is, from the date of the

approved survey plan which also happened to be the date the first logging permit was issued. The appellant argued that it would not be right that sixty-month period should commence from the date of the first survey plan when it was not correctly drawn up. With respect there is no basis for this opinion. What the appellant is trying to do is to interpret the words of the agreement to suit their own case on the face of clear words "effective forthwith" in the agreement. The word "forthwith" means "without any delay or loss of time" and a word which does not imply delay but quite the reverse. See *Roberts* v. *Brett*[1] which imply adopted as to the meaning of "forthwith" in *Hudson* v. *Hill*.[2]

The appellant in fact knew that the contract was to commence forthwith for there is clear evidence that the appellant knew the period of 60 months commenced from August 5, 1974 or thereabout. The Managing Director of the appellant company (PW 4) admitted that the first three lines of the postscript were typed by his office (page 36), line c-d. More importantly the application for extension of time by the appellant company would seem to be consistent with knowledge that the contract was about to expire. The letter from the appellant company dated May 17, 1979 asking for one year's extension said at page 233:

"Our target date was delayed due to the flood caused by the seasonal rain of the previous year. Besides the timber permit was only approved on 1/8/1977."

It would seem clear from this letter that the appellant company knew that the contract period was expiring and an extension of one year was required as the target date could not be met because of the reason given. A fair conclusion is that the appellant had known all along that the commencement of the agreement was either from August 5, 1974, that is, the date of the letter, or at the very latest August 9, 1974 which is the date the first survey plan was prepared but this is unlikely because there is nothing in the letter referring to that.

Wan Hamzah S.C.J. : I have read the judgments in draft of my learned colleagues Tan Sri Datuk Hashim bin Yeop Abdullah Sani S.C.J., and Datuk Syed Agil bin Syed Hassan Barakbah S.C.J. I agree that the appeal should be dismissed. I have nothing to add to the judgments of my learned colleagues.

Appeal dismissed.

Solicitors : *Skrine & Co.; Bachan & Co.*

CHU CHOON MOI v. NGAN SEW TIN

[S.C. (Salleh Abas L.P, Wan Suleiman & Syed Agil Barakbah S.C.JJ.) March 4 & July 19, 1985]

[Kuala Lumpur – Federal Court Civil Appeal No. 188 of 1984]

Land Law – Fraudulent transfer – Damages for alleged wrongful caveat – Proof of fraud – National Land Code, ss. 2 & 340.

Practice and Procedure – Appeal – Failure to take into account probative value of evidence – Appellate court can interfere – Evidence Act, 1950, ss. 3, 45 & 47.

In this case the appellant sought a declaration that the property in question belonged to the appellant's husband and should be transferred to the estate on his death. The respondent is the wife of one David Yong, the son of the deceased. He was responsible for transferring the property to his wife instead of including it in the estate of his deceased father. The respondent filed a counterclaim against the appellant for damages for wrongfully caveating the said property. The learned trial judge dismissed the appellant's claim and also the respondent's counterclaim. The appellant appealed and the respondent brought a cross-appeal.

Held: (1) in this case the learned trial judge had failed to take into account the probative value of the evidence which had been proved and in the circumstances the appellate court had to interfere.

(2) the transfer of the land to the respondent was fraudulent and although she was the registered owner she cannot claim indefeasibility of title under section 340 of the National Land Code because of fraud under section 2 (a) to which she was privy. Nor could she be termed a *bona fide* purchaser in good faith and for valuable consideration under the proviso to that section in order to protect her title or interest;

(3) the cross-appeal relating to the damages for the alleged wrongful caveat must be dismissed.

Cases referred to:

(1) *Johara Bi* v. *Lawrence Lam* [1981] 1 M.L.J. 139.
(2) *Narayanan* v. *Official Assignee, Rangoon* A.I.R. 1941 P.C. 93.
(3) *Saminathan* v. *Pappa* [1981] 1 M.L.J. 121.
(4) *Liew Kaling & Ors.* v. *Public Prosecutor* [1960] M.L.J. 306.

SUPREME COURT.

Franklin Goonting for the appellant.
Ahmad Moosdeen for the respondent.

Cur. Adv. Vult.

Syed Agil Barakbah S.C.J. (delivering the Judgment of the Court) : This appeal involved a claim by the appellant (plaintiff in the Court below) against the respondent (defendant in the Court